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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 145

KALMAN GREENHILL and FRANK PROCTOR, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Motion to Vacate and Remand

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION

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August 24, 1962.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In response to the Government's memorandum in opposition to the motion to vacate and remand this cause, petitioners state as follows:

1. The total failure of the court reporter to obey the command of the Court Reporter Act by recording the arguments to the jury is conceded. Indeed, the additional fact revealed in the supplemental affidavit of

the reporter (Govt. Mem., App. A) underscores that failure; the reporter there states that he was in fact in the courtroom during the arguments, yet failed to record them. No excuse or justification for this failure is offered by the Government.

Moreover, the Government presents no effective refutation of the petitioners' sworn allegations (Motion, pp. 3a-5a) that the prosecutor's summation to the jury did contain numerous and cumulative inflammatory statements generating an atmosphere of geographical hostility toward petitioners. So plainly erroneous is this misconduct by the prosecution that it cannot be readily dismissed by any of the technical or procedural objections now urged by the Government. The inability to recreate the summation in its original and complete form, an inability in no way attributable to petitioners, necessitates the relief suggested by petitioners by their motion herein.

The fact that the reporter recorded no objections made by either counsel is irrelevant. If no objections were made to the prosecutor's remarks, the plain error doctrine of Rule 52(b), Fed. Rules Cr. Proc., comes into operation, a doctrine which presupposes the absence of objections at the time of trial.[1] But to determine whether there was plain error in the summation, a complete transcript of that summation is essential, especially where the prejudicial remarks are cumulative and spread over the entire summation. The unwarranted failure of the reporter to record such a

[1] The Government concedes (Mem., p. 3) that the alleged misconduct of government counsel is ground for reversal "if so grossly prejudicial as to amount to plain error under Rule 52, F. R. Crim. P."

summation wholly frustrates the appeal process and the capacity of an appellate court to note or correct plain errors.[2]

Obviously, the whole purpose of the Court Reporter Act is to insure a complete transcript of the trial proceedings so as to give the litigants and the appellate courts the essential basis for discovering and adjudicating possible errors. Without each and every element of those proceedings being available in transcribed form, basic rights of defendants can become irretrievably lost. And the fairness of the federal appellate process disappears.

2. The Government would have this Court ignore the patent violation of the Court Reporter Act by reason of the failure of the petitioners to complain of that violation in the courts below. But there is no indication that the petitioners or their counsel were aware that the court reporter, who was present at the time of oral summations, was not recording such arguments. More significantly, a defect in the record which frustrates the appeal process is so fundamental in nature that it can be raised at any point and appropriate corrective action taken.

The recent decision of the Fourth Circuit in *United States* v. *Taylor*, 303 F. 2d 165, 169 (C.A. 4), demonstrates this principle. There the failure of the court

[2] Even if an objection to the summation had been made and denied, transcribing merely the objection and the ruling thereon would have furnished little or no light on what the prosecutor actually said. Only a verbatim transcript of all the remarks, taken down as they are uttered, permits a trustworthy judgment as to possible prejudice. Moreover, where the prejudicial remarks are cumulative, as here alleged, it is essential that the complete summation be available so as to judge its total thrust and impact.

reporter to record a significant portion of the trial court proceedings made it impossible to resolve an issue raised in a collateral proceeding under 28 U.S.C. § 2255. Recognizing that this defect in the record vitally affected the defendant's right to pursue his § 2255 remedy, the Fourth Circuit took corrective action in light of that defect—even though the violation of the Court Reporter Act had not previously been raised at any point in the trial court or on direct appeal. See also *Poole* v. *United States*, 250 F. 2d 396, 399 (App. D.C.). Plainly, then, such a matter can be raised for the first time on a direct appeal as is here involved.

In this case, where the failure to record the summation makes impossible a resolution of the basic issue of hostility at the trial, the decision of the Fifth Circuit in *Stephens* v. *United States*, 289 F. 2d 308 (C.A. 5), points the way to the appropriate corrective action. And in the *Stephens* case itself, the defect was raised and corrective action taken at the appellate level, the matter not having been raised before the trial court.

3. The Government's reference (Mem., p. 4) to what it describes as "the overwhelming evidence against petitioners summarized in the government's brief in opposition" cannot serve as an excuse for the reporter's failure to record the summation to the jury. Nor can it cast any light on whether that summation amounted to plain error under Rule 52. Prejudicial error of this nature is a factor having no necessary relation to the guilt or innocence of the defendant. Fundamental concepts of fair criminal justice require that courts

outlaw such an error whenever it appears. *Berger* v. *United States*, 295 U.S. 78.

Respectfully submitted,

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